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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

During more than 170 years of Contract Clause adjudication, this Court has developed doctrines that have sought to resolve the fundamental tension at the core of the Clause between the reliance interests of the parties to a contract and the interests of a state in exercising its sovereign power in light of unforeseen and dramatically changed circumstances. Relying on the Contract Clause, the Court of Appeals' decision on appeal strikes down a state statute that does not repudiate existing, *substantive* financial obligations but instead establishes a new *process* by which a political subdivision of the state makes decisions about whether to incur additional, multi-billion dollar debt—a political subdivision which, through mismanagement, had already imposed multi-billion dollar debt on the state's citizens. But the Court of Appeals fundamentally misreads and misapplies this Court's decisions. The decision on appeal allows the federal judiciary to ride roughshod over a state's sovereign interest in gaining control in the future of a political subdivision that has gone out of control in the past.

The decision on appeal is thus in direct conflict with the doctrines of this Court that have sought to resolve the tension at the core of the Contract Clause and to protect the legitimate interests of the states. With the recent revival of the Contract Clause as a constitutional basis for invalidating state laws, this case provides a vehicle for needed clarification and reaffirmation of those doctrines that protect state interests. In that context, the decision on appeal presents the following specific questions.

(1) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with this Court's express reservation doctrine which allows states explicitly to reserve in their statutes the right to

modify contracts in the future without violating the Contract Clause of the United States Constitution?

(2) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with this Court's Reserved Powers Doctrine which, despite the strictures of the Contract Clause, does not require a state to adhere to a contract that surrenders the state's essential sovereign authority to structure the governance of a state's political subdivisions?

(3) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with *Energy Reserves Group Inc.* v. *Kansas Power & Light Co.*, 51 U.S.L.W. 4106, 4109 (January 24, 1983) and with the appropriate legal standards for determining whether the constitutional requirement of "substantial impairment" has been met in a Contract Clause challenge, especially the requirement that a state law must upset the legitimate expectations of the contracting parties?

(4) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with this Court's "reasonable and necessary" test for determining whether a state law which substantially impairs contract is nonetheless valid under the Contract Clause and because, in particular, it improperly used a "strict" application of the "reasonable and necessary" test on the erroneous assumption that the contracts of a political subdivision comprised of utilities are the contracts of a state, rather than applying the appropriate, "deferential" version of the test used in *Energy Reserves* where the contracts allegedly impaired were those of a public utility?

(5) Whether the Court of Appeals' decision should be reversed, pursuant to this Court's supervisory power, because neither the District Court nor the Court of Appeals ever cited to the voluminous record (27 wit-

nesses and more than 100 exhibits); because, rather than remanding the case in light of the District Court's manifest violation of Rule 52, F.R.Civ.P., the decision resolved factual disputes on constitutional issues that were not the subject of *any* factual findings in the District Court; and because the Court of Appeals' decision is thus outside the appropriate functions of an appellate court?

PARTIES BELOW

Appellants below in these consolidated cases were the State of Washington and the following Washington State officials: the Governor, John Spellman, the Secretary of State, Ralph Munro, and the Attorney General, Kenneth O. Eikenberry. The Don't Bankrupt Washington Committee was intervenor-appellant in both cases. Appellees below were the United States and three banks, Continental Illinois National Bank and Trust Company of Chicago, Seattle-First National Bank and Morgan Guaranty Trust Company of New York.

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT

The Don't Bankrupt Washington Committee appeals from the final judgment of the United States Court of Appeals for the Ninth Circuit, dated January 11, 1983, holding that the Washington State Energy Financing Voter Approval Act, chapter 6, 1981 Wash. Laws (2d ex.sess.) [hereinafter "Initiative 394" or "394"] is not constitutional under the Contract Clause of the United States Constitution as applied in these consolidated cases.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears in the appendix to the jurisdictional statement [hereinafter "App."], p. 1a, is not yet reported. The relevant portions of the transcript of the District Court's oral findings of fact and conclusions of law, which were read into the record on June 29, 1982, are unreported. See App., p. 21a. (transcript excerpts).

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1983. See App., p. 1a. No motions for rehearing were filed. A notice of appeal to this Court was filed in the Court of Appeals for the Ninth Circuit on January 20, 1983. See App., p. 24a. This appeal is being docketed in this Court within 90 days of the final judgment below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Contract Clause of the U.S. Constitution, Art. I, § 10, Cl. 1, provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The case also involves two Washington State statutes: Initiative 394, chapter 6, 1981 Wash. Laws (2d ex.sess.) and the State law providing authority for creation of joint operating agencies. RCW ch. 43.52. Pertinent provisions of these statutes are set forth in the Appendix at pp. 26a-34a.

STATEMENT OF THE CASE

Enacted by an overwhelming 58-42 percent margin at the November 3, 1981 Washington general election, Initiative 394 was a measured response to an unforeseen economic crisis created by $20 *billion* cost overruns and multi-year construction delays at the five nuclear power projects then under simultaneous construction by the Washington Public Power Supply System [hereinafter "WPPSS"], a political subdivision of the State. The Initiative was drafted after an exhaustive State Senate report [hereinafter "State Senate Inquiry"] found, in January, 1981, that WPPSS "mismanagement" was the "most significant cause of the cost overruns and schedule delays" and that, despite dramatically increased costs and changed economic assumptions, WPPSS had not conducted needed cost-effectiveness studies of the Projects

and did not intend to do so.[1] The Initiative established a process—an independent cost-effectiveness study and voter approval of WPPSS's future financing strategy—which WPPSS had to follow before it could impose even greater debt on the State's ratepayers through issuance of additional revenue bonds to finance future work on the Projects. The Initiative did not mandate a substantive result—did not, that is, repudiate any existing debt or terminate any of the Projects. This jurisdictional statement is being filed by the Don't Bankrupt Washington Committee [hereinafter "the Committee"], a citizens' group that drafted and campaigned for Initiative 394. The Committee intervened as defendant-appellant and participated extensively in the consolidated proceedings below.

(1) *WPPSS.* The Washington Public Power Supply System was organized in 1957 as a municipal corporation of Washington State (a "joint operating agency"), with the authority to construct, operate and own plants for the generation of electricity and to issue revenue bonds to finance their construction. RCW § 43.52.300 & RCW § 43.52.3411. WPPSS' membership consists of 19 public utility districts and four cities (the "Members"). The management and control of WPPSS have been vested solely in a Board of Directors (the "Board") which, until recently, has consisted of one representative from each of the 23 Members.

The Five Projects. WPPSS' major undertaking has been the attempted simultaneous construction of five massive nuclear power projects—three (Projects 1, 2 and 3)

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[1] Exhibit 26, pp. 3-6. Neither the Court of Appeals nor the District Court *ever* cited to the extensive record admitted into evidence. References in this jurisdictional statement to "CR" (clerk's record) are to items listed on the Trial Court Docket sheet that became part of the record on appeal (including testimony from 27 witnesses) and references to "Exhibits" are to the more than 100 exhibits admitted into evidence that were also part of the record on appeal and were listed in the Amended Pretrial Order. CR 170.

in conjunction with certain participating utilities and the Bonneville Power Administration [hereinafter "BPA" or "Bonneville"] and two (Projects 4 and 5) in conjunction with certain Participants alone. BPA, an agency of the Federal government, markets electricity to the Northwest from Federal hydroelectric projects. The Participants are approximately 100 utilities which vary slightly for each of the five Projects. Construction and financing of all five Projects began in the early to mid-1970s, but none of the Projects has been completed. WPPSS has, to date, issued more than $8 billion in revenue bonds for all five Projects, making it the largest issuer of tax-exempt debt in the United States. The Participants for all five Projects are obligated by contract to pay off this debt from rates charged to their ratepayers even if the Projects are never completed—and BPA guarantees payment of that debt for Projects 1-3 through its ratepayers. WPPSS—popularly known as "Whoops"—has become a nationally known financial "fiasco" in significant part due to WPPSS mismanagement.[2]

The Relevant Contracts. WPPSS' organic statute, RCW ch. 43.52, provides WPPSS' authority for financing, constructing and operating Projects 1-5. App., pp. 33a-34a. This statute is the basis for, and is incorporated in, the three interrelated contracts relevant to Projects 1-3 and to the disposition of this case—the Project Agreements between WPPSS and BPA, the Net Billing Agreements between WPPSS, BPA and the Participants and the bond resolutions between WPPSS and bondholders. See App., p. 3a; U.S. Brief in 9th Cir. at 26-27. These contracts require WPPSS to issue bonds to complete the Projects, but this duty is heavily qualified in the contracts themselves.

The Court of Appeals' discussion of these contracts is wrong or misleading in two important respects. First,

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[2] "A Fiasco That May Rock Municipal Bonds," Business Week, p. 94 (Feb. 7, 1983); Peter W. Bernstein, "A Nuclear Fiasco Shakes the Bond Market," Fortune, p. 100 (Feb. 22, 1982).

Projects 1-3 were not begun pursuant to BPA's federal authority or to any federal "program." See App., pp. 3a. In fact, BPA's lack of authority to build and finance nuclear projects directly led it informally to persuade WPPSS to build Projects under authority of RCW ch. 43.52, the State's statute. CR 170, ¶¶ 23-38. Second, WPPSS' obligation to BPA and the bondholders to issue bonds to complete Projects 1-3—the duty allegedly impaired by 394—is not absolute. See App., pp. 3a-6a, 11a. Appellees conceded below that the Projects should only be completed if cost-effective.[3]

The Problems. The Court of Appeals never even mentioned the 11 month, 184 witness State Senate Inquiry—which is a crucial document in the legislative history of Initiative 394. The opinion's description of the problems which led to 394 was limited to a sentence and omits WPPSS mismanagement. See App., p. 6a. By contrast, appellees never contested the legislative history of the Initiative admitted into evidence, see CR 152 (Affidavit of Committee Chairperson Steve Zemke) and Exhibits 107A-107Z, which demonstrates that Initiative 394 was intended to respond to the following problems *inter alia*: (a) massive estimated cost increases for all five Projects from $4 to $24 billion—including a May, 1981 jump in the estimates of nearly $7 billion[4]— which made the WPPSS Projects among the very worst in the nation in terms of cost overruns for comparable plants, Exhibit 106; (b) multi-year delays that dramatically added to the costs of the Projects;[5] (c) significantly changing economic assumptions, primarily a decline in estimated annual increase in projected energy demand

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[3] Banks' Opp. to Motion to Dismiss, p. 5, CR 71; Exhibit 110, Answer #22.

[4] Exhibit 26, p. 5.

[5] By early 1981, the completion dates had fallen years behind schedule for all five Projects: No. 1 (5 years, 5 months); No. 2 (6 years); No. 3 (4½ years); No. 4 (4 years); No. 5 (2½ years). Exhibit 26, pp. 19-21.

from seven percent a year in the early 1970s to less than two percent by 1981;[6] (d) the State Senate Inquiry's finding that WPPSS' mismanagement was the "most significant cause" of the multi-billion dollar cost increases, in important part, because WPPSS had never used its annual budget as a management tool to constrain costs, Exhibit 26, pp. 3-6; and (e) the striking failure of WPPSS to conduct cost-effectiveness studies in light of major, unforeseen changes that had occurred during the 1970s, *id.*, pp. 3-6, 58.

Appellee Morgan's bond analysis department said that the State Senate Inquiry was "*damning . . . objective and thorough*" and, if correct, "*billions of dollars have already been wasted by mismanagement* [and the WPPSS'] *construction budget is practically out of control. . . .*" Exhibit 103F, pp. 1-3. (Emphasis supplied.) The introduction to the State Senate Inquiry said WPPSS' cost overruns "threaten WPPSS itself, the region's utilities, our economy and most importantly the well-being of the Northwest's citizens." Exhibit 26.

(2) *Initiative 394.* In light of the grave problems created by WPPSS, the purposes of Initiative 394 included the following as applied to WPPSS Projects 1-5, CR 152, ¶¶ 19-27: (a) ensure a vote in WPPSS' future financing decisions for ratepayers who would bear the burden of additional debt, Initiative 394, § 2; (b) ensure WPPSS' consideration of cost-effectiveness criteria in its future financing decision; and (c) force WPPSS to live within stated budgets in the future. To accomplish these goals, the Initiative mandates two requirements if an existing, incomplete plant poses major public policy problems—if, that is, it is 200 percent over budget and, as of July 1, 1982, requires more than $200 million to complete. Initiative 394, § 3(2). First, WPPSS

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[6] WPPSS' Treasurer Perko Dep., p. 22, CR 141 (if lesser demand known in early 1970's, projects would not have been built); Exhibit 26, p. 58 (a "substantial change in the original assumptions . . .").

must hire an independent consultant to prepare a draft cost-effectiveness study of each WPPSS Project. *Id.*, § 5-6. Second, after a period of public comment and issuance of a final cost-effectiveness study, WPPSS must obtain from the voters in WPPSS' 23 Member jurisdictions "authority for the expenditure of funds" for any *future* construction before selling revenue bonds in the *future* to finance that construction. *Id.*, § 4. This requirement, as applied to Projects 1-3, became effective on July 1, 1982.

Opponents of the Initiative spent $1.3 million, dwarfing the Committee's expenditures of $215,000, in the hotly contested, widely debated 1981 election campaign. Exhibit 107Z. Nonetheless, on November 3rd, Initiative 394 received 532,000 votes for adoption (58 percent of those voting) and 384,000 against (42 percent). See generally, CR 152, ¶¶ 28-50 (Zemke Affidavit). Initiative 394 was never implemented with respect to Projects 4-5 because those Projects were terminated by WPPSS in January, 1982 with $2.25 billion in bonds outstanding. The Initiative has not yet been implemented for Project 1 because it was deferred for up to five years by WPPSS in April, 1982. In late Spring, 1982, WPPSS selected an independent consultant who began the cost-effectiveness study of Projects 2-3. At the time of the District Court's decision (June 29, 1982), the consultant had not completed a draft study, and WPPSS had not scheduled an election pursuant to Section 4 of the Initiative.

Leading bond analysts testified without contradiction that Initiative 394 had benefited appellees in the past and might, if fully implemented, benefit them in the future. Titmuss Dep., pp. 86-107, CR 165; Sitzer Dep., pp. 86-106, 166-170, CR 187. For example, a "yes" vote in an election held under 394 would develop a much needed public consensus among ratepayers on the need for the Projects and would impose much needed budget discipline on WPPSS. A "no" vote would be beneficial if the Projects were not clearly cost effective.

(3) *The Proceedings Below.* In December, 1981, three national banks—Morgan Guaranty, Continental Illinois and Seattle First—in their capacities as trustees for the bondholders in Projects 1-3, respectively, filed suits against the State of Washington, the Governor, the Attorney General and the Secretary of State seeking, *inter alia*, a declaration that Initiative 394 was void under the Contract Clause because the "mere existence" of its voter approval requirement for the issuance of future debt—which the voters would have to bear—impaired WPPSS' obligation to finance completion of Projects 1-3. (The Initiative's cost-effectiveness requirement was conceded to be valid.) In April, 1982, the United States filed a similar suit against the same defendants. The Committee intervened as defendant in both suits, which were consolidated. All parties engaged in extensive, expedited discovery and submitted the case on a stipulated record which included testimony from 27 witnesses and more than 100 exhibits, totaling thousands of pages. Appellants submitted more than 80 pages of proposed findings. Less than two working days after receipt of this complex record, including one day devoted to oral argument, the District Court ruled from the bench on June 29, 1982 that Initiative 394 violated the Contract Clause. See App., pp. 21a-23a. It failed to cite to any contractual provision that was impaired or to reference any part of the extensive record, although there were key issues of fact that the parties had put in dispute. See Part E, *infra*.

On January 11, 1983, the Court of Appeals held 394 violated the Contract Clause as applied to Projects 1-3. See App., p. 20a. Without ever citing to 394's history, to the record or to the contract terms impaired, the Court held that, once executed, the relevant contracts vest *total* discretion in WPPSS and BPA to determine whether huge additional indebtedness should be incurred by a State municipal corporation and then borne by the State's ratepayers, despite WPPSS mismanagement and multi-billion dollar cost-overruns.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Although by its terms absolute ("no State shall . . . pass any . . . Law impairing the Obligation of Contracts"), the Contract Clause has not been so interpreted by this Court. U.S. Const., Art. I, § 10, Cl. 1. Instead, during more than 170 years of Contract Clause adjudication, this Court has developed doctrines which have sought to reconcile the fundamental tension at the core of the Clause between the reliance interests of the parties to a contract and the interests of a state in exercising its sovereign powers in light of unforeseen and dramatically changed circumstances.[7]

The decision of the Court of Appeals is in direct conflict with a number of doctrines announced by this Court to resolve that tension and protect the interests of states—including the express reservation doctrine, the Reserved Powers Doctrine, the substantial impairment requirement and the "reasonable and necessary" test. This decision must not be allowed to stand, since its fundamental misreading and misapplication of this Court's decisions allows the federal judiciary to ride roughshod over a state's sovereign interest in gaining control of a political subdivision that has gone out of control with multi-billion dollar implications. More particularly, the Court of Appeals simply cannot be right that, despite mismanagement by a political subdivision, the discretion of that subdivision to impose additional, future debt on the State's ratepayers is immune from a subsequent State enactment which establishes a moderate and reasonable *process* for making future decisions deeply affecting the State's citizens and does not impair existing, *substantive* financial obligations or repudiate existing debt.

The paramount need for review is heightened because this Court has decided only a handful of Contract Clause cases since its landmark decision nearly 50 years ago in

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[7] See generally, B. Wright, The Contract Clause of the Constitution (1938).

Home Bldg. & Loan Assoc. v. *Blaisdell*, 290 U.S. 398 (1934) [*"Blaisdell"*]. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) [*"U.S. Trust"*]; *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) [*"Spannaus"*]. With the "revival" of the Contract Clause in *U.S. Trust* and *Spannaus* as a constitutional basis for invalidating state laws and with the prospect of increasing numbers of Contract Clause cases,[8] this action provides a vehicle for a much needed contemporary reaffirmation of those doctrines that protect state interests—some of which have their origin in the 19th Century. Moreover, the Court of Appeals decision was rendered two weeks before this Court's recent decision in *Energy Reserves Groups, Inc.* v. *Kansas Power & Light Co.*, 51 U.S.L.W. 4106 (Jan. 24, 1983) [*"Energy Reserves"*] which held a state law did not constitute a substantial impairment of contract and which used an analysis similar to the one appellant had unsuccessfully urged in the Court of Appeals. As will be demonstrated below, the Court of Appeals' decision is so at odds with the doctrines of this Court and its implications for voiding valid and necessary state laws so great that it should be either summarily reversed or vacated and remanded for reconsideration in light of *Energy Reserves*.

In the alternative, this Court should note probable jurisdiction to address unresolved constitutional questions of major significance. Most importantly, as *Energy Reserves* makes clear, there are two different applications of the ultimate, "reasonable and necessary" test under the Contract Clause—a more deferential application if the contract allegedly impaired is between a public utility and a private party and a stricter application if a state is a party to the contracts impaired. 51 U.S.L.W. at 4109. In this case, the contracts of WPPSS, as a political subdivision of the State comprised of public utilities, are much more analogous to the contracts of a public utility.

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[8] See, *e.g.*, Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Supreme Court Review 95.

They are not contracts of the State. *See* Part D, *infra*. Accordingly, probable jurisdiction should be noted on the fundamental constitutional question of whether the deferential or strict application of the "reasonable and necessary" test is required when the contracts allegedly impaired by State law are those not of the State but of a political subdivision which, through mismanagement, has imposed multi-billion dollar debt on the State's citizens.

A. The Court of Appeals Ignored This Court's Express Reservation Doctrine.

(1) This Court has long held that, to avoid application of the Contract Clause, states may *expressly* "reserve in their contracts and even in their constitutions the power to change their minds." L. Tribe, American Constitutional Law 470 (1978). This doctrine, first articulated in Justice Story's concurrence in the landmark case of *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 708 (1819), has been reaffirmed by this Court in an unbroken line of cases.[9] With express reservation provisions, parties who wish to contract with a state or one of its subordinate bodies are on clear notice that subsequent state law may change the terms of those contracts. The reliance interest protected by the Contract Clause, *Spannaus*, 438 U.S. at 245, is thus modified, *Atlanta* v. *Metrop. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1092 (5th Cir. 1981), and a state's action under such a provision is subject to Due Process Clause, not Contract Clause, limitations. *Shields* v. *Ohio*, 95 U.S.

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[9] See B. Wright, The Contract Clause of the Constitution, 21-22, 58-60, 84-85, 168-178 (1938). See also, *Knoxville Water Co.* v. *Knoxville*, 189 U.S. 434 (1903); *Hamilton Gaslight & Coke Co.* v. *City of Hamilton*, 146 U.S. 258 (1892); *Greenwood* v. *Union Freight R.R. Co.*, 105 U.S. (15 Otto) 13, 17 (1881); *Tomlinson* v. *Jessup*, 82 U.S. (18 Wall.) 454, 458 (1892); *Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190, 218 (1872).

(5 Otto) 319, 324-325 (1877); *Hamilton Gaslight*, n.9, *supra*, 146 U.S. at 270-71.[10]

(2) The very statutory provision that gives WPPSS the authority to issue revenue bonds contains just such an express reservation which warned BPA and the bondholders that state law could change. Section 3411 of RCW ch. 43.52 provides, in pertinent part:

> . . . *all* the provisions of law as now or *hereafter* in effect relating to revenue bonds or warrants of public utility districts shall apply to *revenue bonds* or warrants *issued by the joint operating agency* [WPPSS] including, *without limitation*, provisions relating to: . . . [(a)] the *covenants that may be contained therein and the effect thereof*; [and (b)] the execution, *issuance*, *sale*, funding, or refunding, redemption and registration *of such bonds* . . . (Emphasis supplied.)

As a law that relates to the revenue bonds of public utility districts, Initiative 394 is plainly within the clear and inclusive express reservation language of Section 3411.[11] The crux of appellee banks' case is that the Initiative impairs the covenants in the bond resolutions obligating WPPSS to issue bonds to complete the Projects.[12] But the appellee banks concede that Section 3411 is incorporated by reference in the bond resolutions and, indeed, is the legal basis for the WPPSS' obligation to issue bonds. See Banks' Brief in 9th Cir. at 27, 30. Accordingly, given the express reservation of Section 3411, their Contract Clause case may proceed no further.

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[10] *Phillips Petroleum Co.* v. *Jenkins*, 297 U.S. 629, 634-35 (1936); *Wright* v. *Minnesota Mutual Life Insurance Co.*, 193 U.S. 657 (1904). *See also, Ferguson* v. *Skrupa*, 372 U.S. 725 (1963); *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 232-33 (1945).

[11] The duties created by the Initiative apply to public utility districts. Initiative 394, § 3. Any statutory duties applicable to public utility districts are made applicable to joint operating agencies such as WPPSS through the express terms of Section 3411.

[12] See, *e.g.*, Exhibit 9, § 3.4 (Bond Resolution No. 640—Project 2).

Similarly, the crux of appellee United States' case is Section 5(a) of the Project Agreements between WPPSS and BPA which provides, in pertinent part, that

> The Supply System shall, in good faith and with due diligence, use its best efforts to issue and sell Project bonds to finance the cost of the Project and the completion thereof . . . *provided, however*, that in *each such case such Project Bonds may then be legally issued and sold.* (First emphasis in original; subsequent emphasis supplied.)[13]

Section 3411 was enacted in 1957. The Project Agreements for Projects 1-3 were executed in the early 1970s. Obviously, the drafters of Section 5(a) of the Project Agreements were aware of Section 3411, the State statute which gave WPPSS authority to issue bonds. The "provided, however" clause thus constitutes a clear warning to BPA that each and every subsequent sale of bonds following the initial sale authorized by the bond resolutions must be consistent with the subsequent law of the State of Washington. The Initiative is just such a subsequent law.

(3) Although the meaning and application of a state statute challenged under the Contract Clause is a question of Federal law, App., p. 12a, that principle does not give federal courts the power to indulge in judicial policy-making unconnected from the text of the statutes and contracts at issue. Yet, that is just what the Court of Appeals did in riding roughshod over the express reservation of Section 3411.

The Court of Appeals violates a fundamental doctrine of construction: plain meaning. It never analyzes the language of Section 3411; it, in fact, omits a crucial passage when quoting from the provision (laws hereafter in effect shall apply to the "issuance [and] sale . . . of such bonds"); and it claims to find "ambiguity" in the provision but then never bothers to explain what is ambiguous. App., p. 12a. Most importantly, without analyz-

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[13] See, *e.g.*, Exhibit 2, § 6(a) (Project Agreement No. 2).

ing the language or structure of the statute or attempting to discern any legislative history, the Court concludes that

> the effect of Section 3411 simply is to render applicable to future bond issues the requirements of state law then in existence so long as imposition of those requirements *does not modify pre-existing contracts.* *Id.*, p. 13a (emphasis supplied).

But the purpose and effect of Section 3411 is, on its face, precisely the opposite ("shall apply . . . without limitation . . . to . . . covenants . . . and the effect thereof").[14] The Court of Appeals' conclusion is simply in flat conflict with the many holdings of this Court allowing states to put parties on notice, through express reservation clauses, that contracts may be changed by future state laws and that such expressly reserved changes are subject to Due Process but not Contract Clause limitations.

The Court of Appeals' discussion of Section 5(a) of the Project Agreements between WPPSS and Bonneville is equally at odds with this Court's decisions. The Court of Appeals makes no attempt to explain how Section 5(a)'s "*provided, however*" warning can mean anything but that future sales of additional bond series were subject to changes in state law because Section 3411 requires it. Indeed, the phrase from Section 3411 omitted by the Court of Appeals ("issuance [and] sale . . . of such bonds") is, of course, tracked by Section 5(a) ("*provided, however* . . . in each such case such Project Bonds may then be legally issued and sold"). Just as with its discussion of Section 3411, the Court of Appeals can only

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[14] The State legislature wanted an express reservation because the joint agency, as a hybrid of public utilities, would be involved in the construction of larger projects using what in 1957 was considered a new technology, nuclear power, RCW 43.52.260, and because the *external* check of a state power commission on joint agencies like WPPSS in a predecessor of RCW 43.52 was abolished. *Compare*, RCW 43.52.272 with Ch. 281, 1953 Wash. Laws. See also, Exhibit 26, p. 53 (no utility rate commission check on WPPSS' financing and budgeting).

take refuge in an untenable judicial position in "construing" Section 5(a) of the Project Agreements: the language cannot mean what it says.

(4) In vitiating the Court's express reservation doctrine, the Court of Appeals also does violence to the fundamental and long-standing doctrine of the *Charles River Bridge* case that, to avoid difficult constitutional questions posed by challenges to contracts and not to encumber state governance, the contracts of state entities are to be strictly construed against plaintiffs (appellees here) in actions against a state.[15] Although this point was briefed by appellant, the Court of Appeals ignored 150 years of this Court's teaching and incorrectly cited *U.S. Trust*—which did not involve construction of an express reservation clause—in support of its clearly mistaken position that express reservation clauses should be interpreted against the state.[16] See App., p. 12a. *Cf.*, *Energy Reserves*, 51 U.S.L.W. at 4108, n.10 (statutes should be construed to avoid constitutional questions).

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[15] *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 543 (1837) ("[A]ny ambiguity in the terms of contracts must operate against the [plaintiff] . . ."). See also, *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659, 666 (1878); *Keefe* v. *Clark*, 322 U.S. 393, 396-97 (1944) (case involved bond contracts of political subdivisions and any "obligation alleged to have been impaired [must] be clearly and unequivocally expressed").

[16] While acknowledging that the express reservation issue is a close question, see App., pp. 10a-13a, the Court of Appeals makes several elementary mistakes in its discussion. First, it relies on footnote 23 in *U.S. Trust*, App. p. 11a, but the case cited there stands for the proposition—not involved in this case—that *express* reservations are valid, but *implied* reservations of a state's power to repudiate debt contracts are disfavored. *Murray* v. *Charleston*, 96 U.S. 432 (1878). Second, the Court of Appeals states the "reservations are not to be lightly inferred," *id.*, p. 12a, but, again, it relies on a passage in *U.S. Trust* that does *not* deal with this Court's rules of construction involving *express* reservations. The passage instead deals with an entirely different issue regarding the limited set of circumstances under which this Court has implied a reservation of power by the State under the Reserved Powers Doctrine. 431 U.S. at 25. See Part B, *infra*.

In sum, the express reservation doctrine and the long-standing rule of construction of *Charles River Bridge* are so fundamental to the legitimate protection of the State's interests under the Contract Clause that this Court should either summarily reverse the holding of the Court of Appeals or note probable jurisdiction. See *Energy Reserves*, 51 U.S.L.W. at 4110 (an express reservation clause could "dispose of the Contract Clause claim").

B. The Court of Appeals' Decision Is In Conflict With This Court's Reserved Powers Doctrine.

(1) Even if the State had not expressly reserved the right to modify bond issuance by WPPSS, Initiative 394 would still be constitutional under the long-standing Reserved Powers Doctrine. As this Court stated in *U.S. Trust*, 431 U.S. at 23,

> [t]his doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. *In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of sovereignty.* (Emphasis supplied.)

These "reserved powers" constitute *implied* terms of all contracts entered into by a state entity. A state law within the scope of the Reserved Powers Doctrine is outside the strictures of the Contract Clause and need not be justified even if it impairs contract. *Blaisdell*, 290 U.S. at 435. Such a law is subject only to Due Process limits. This Court has long recognized that a *state's power to alter the structure of governance of its political subdivisions* is a "reserved power" and that any contractual terms limiting that sovereign power are invalid *ab initio*. *Meriwether* v. *Garrett*, 102 U.S. 472 (1880).[17]

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[17] In this seminal case, various creditors and bondholders of Memphis claimed a state law abolishing the municipality was in-

Although the scope of the Reserved Powers Doctrine has been narrowed since the late 19th Century, a state's power to alter the structure of governance of political subdivisions is at the core of the Reserved Powers Doctrine, and the decisions of this Court so holding have continuing vitality. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833, 845, 851 (1976) (federal power does not deny the states the right to exercise essential "attributes of sovereignty" like structuring "integral governmental functions").

(2) Because there has been no election under the Initiative to date, 394's only present effect is to change the structure of WPPSS' governance with respect to a single decision on *future* bond issuance for each Project. In challenging the Initiative's "mere existence," appellees are thus objecting to 394's change in *the process of who shall decide*. Unlike *U.S. Trust*, which involved a state law alteration in the purposes for which revenues from bond financed facilities could be used, this case does not, at this point, involve any substantive changes by the Initiative in the financial obligations owed to bondholders or to Bonneville. *Id.*, 431 U.S. at 24. Accordingly, under the Reserved Powers Doctrine, the Initiative is outside the ambit of the Contract Clause because it only changes

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valid under the Contract Clause. This Court, in holding the Contract Clause inapplicable to such action, stated:

> Municipal corporations are mere instrumentalities of the State. . . . Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. . . . *All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of Legislative power to them.* *Id.* at 511. (Emphasis supplied.)

Of course, even a Reserved Power is subject to Due Process limitations and could not be used to avoid obligations to pay *existing* debt without compensation. See generally, Schultz, *The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations*, 36 Mich.L. Rev. 385, 401-408 (1938).

the governing processes of WPPSS, a municipal corporation of the State. Exhibit 1, § 1(p).

(3) This Court should summarily reverse or, at the least, note probable jurisdiction because the Court of Appeals' decision is in direct conflict with the Reserved Powers Doctrine and has vitiated the essential sovereign attribute of the State to alter the structure of governance of a political subdivision. See App., p. 14a. To meet appellant's Reserved Powers argument, the Court of Appeals relied on cases cited in a footnote in *U.S. Trust. Id.* But these cases are all demonstrably inapposite because they involve State laws imposing *substantive* financial limitations which this Court itself characterized as restricting a state's "taxing power so that the [existing] debt cannot be repaid." *U.S. Trust*, 431 U.S. at 24, n.22. The Court of Appeals never came to grips with the basic fact that the Initiative has imposed no substantive limitation on WPPSS' ability to perform its financial obligations and repudiated no debt obligations. The process for making the decision about whether or not to issue *additional* bonds has simply been removed from the WPPSS' Board, which had not "exercised [its] responsibilities effectively," Exhibit 26, p. 4, and given to citizens who will bear the huge financial burden of that decision.[18]

C. The Court of Appeals' Decision Is At Odds With Appropriate Legal Standards for Determining Whether a Technical Impairment of Contract Is "Substantial" In A Constitutional Sense.

Even if there is technical impairment of contract by a state law that is not within the Reserved Powers Doctrine, a critical inquiry in Contract Clause adjudication

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[18] See also, *Fidelity Union Trust Co.* v. *New Jersey Highway Authority*, 85 N.J. 277, 426 A.2d 488, 499-500 (S.Ct. N.J. 1981), *appl. dismissed for want of subst. fed. quest.*, 102 S.Ct. 76 (1981) (alternative holding on Reserved Powers Doctrine sustaining, against bondholders' attack, State law change in governance in analogous circumstances).

> must be whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. *Minimal alteration of contractual obligations must end the inquiry . . . . Spannaus*, 438 U.S. at 244-45. (Emphasis supplied; footnote omitted.)

The decisions of this Court have yielded legal standards which must be satisfied before an impairment is "substantial" in a constitutional sense. First, an important contractual term must be substantially modified, *U.S. Trust*, 431 U.S. at 19-20, 31, *Spannaus*, 438 U.S. at 240, 246, and substantial modification may only be found if a challenged state law is a "but for" cause of a party's inability to perform its important duties. But the Court of Appeals never adopted this constitutional standard—a standard which appellees could not satisfy.[19] See App., pp. 14a-16a.

Second, and most importantly, a state law must substantially upset the legitimate expectations of the parties. *U.S. Trust*, 431 U.S. at 19-21, n.17; *Spannaus*, 438 U.S. at 246-47, 248; *Energy Reserves*, 51 U.S.L.W. at 4109-4110. In cases such as this one, the legal standard that must be met is whether the contracting parties had expectations about what would occur if circumstances dramatically changed and whether the challenged state law upset those expectations. Satisfaction of that legal standard here must first involve an inquiry into whether BPA and the bondholders had expectations when they

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[19] For example, the Initiative was not a "but for" cause of any WPPSS' delay in holding a bond sale—and the District Court did not so find—because, at the time of the District Court decision in June, 1982, Project 1 had been deferred; WPPSS stated it had enough funds to continue construction on Projects 2-3 until mid-1983; and WPPSS could thus have complied with 394's procedures long before it stated it would return to the bond markets. Exhibit 23, pp. 6-7. In addition, any substantive effects of 394 were contingent because either a "yes" or "no" vote could benefit appellees under certain circumstances. See p. 7, *supra*.

entered into the contracts that problems such as massive cost overruns, gross mismanagement and failure to conduct cost-effectiveness studies would occur. But the Court of Appeals simply failed to adopt the proper legal standard in assessing whether 394 upset the reasonable and legitimate expectations of the contracting parties, see App., p. 15a, a failure underscored by the District Court's lack of *any* finding on legitimate expectations. See App., pp. 21a-23a.

The Court of Appeals' failure on this key issue is manifest in light of *Energy Reserves*. In finding no substantial impairment, this Court stated that the parties there did not expect a major deregulation of natural gas. 51 U.S.L.W. at 4110. Similarly, the express reservation in their contracts making future state and federal law applicable meant, at the least, that the parties would not be exempt from any regulatory limitations of prices whatsoever. *Id.* Here, too, there was a major unforeseen change—WPPSS mismanagement leading to billions of dollars of cost overruns—and an express reservation in State statute to alter the law on the very obligation allegedly impaired, the obligation to issue bonds. See RCW 43.52.3411. Thus, in *Energy Reserves*, ERG could not reasonably expect no substantive changes in state regulation of prices after the unforeseen deregulation of natural gas, especially in light of an express reservation clause on price changes. Similarly, neither BPA nor the bondholders could reasonably expect that in light of WPPSS's unforeseen mismanagement and multi-billion dollar cost overruns—which the State's citizens would have to repay—that the State would not, through new law, establish a *process* for disciplining WPPSS' ability to incur *additional* indebtedness, especially in light of the express reservation on bond issuance in RCW § 43.52.3411. The Court of Appeals' analysis of the reasonable expectations of the parties, because it does not consider the circumstances presented, is in direct conflict with *Energy Reserves*.

This Court should vacate and remand for reconsideration in light of *Energy Reserves* or note probable jurisdiction because the Court of Appeals failed to apply the appropriate legal standards on the constitutional issue of "substantial" impairment.

D. The Court of Appeals' Decision Is In Conflict With This Court's "Reasonable and Necessary" Test, In Important Part, Because WPPSS Is Not The State And Greater Deference Is Due To The State's Justification For The Initiative Than Given By The Court of Appeals.

(1) Even if the "mere existence" of Initiative 394 constitutes "substantial" impairment, the Initiative is valid under the tests of *U.S. Trust*, *Spannous* and *Blaisdell* because

> [t]he Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, *an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. U.S. Trust*, 431 U.S. at 25. (Emphasis supplied; footnote omitted.)

This Court should note probable jurisdiction because of the critical importance of a threshold issue in the application of this test. The Court of Appeals, citing *U.S. Trust*, premised its application of the "reasonable and necessary" test on the proposition that because "the State is a contracting party, we give less deference to its claims of justification for impairment." *See* App., p. 16a.

But the Court of Appeals is flatly wrong. In contrast to *U.S. Trust*, the State of Washington is not a party to terms of the Project Agreements and bond resolutions.[20]

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[20] For example, the Official Statements which were published with each sale of a series of Project 1-3 bonds stated explicitly in bold face type on their very first page that the Project 1-3 "bonds are not an obligation of the State of Washington or any political subdivision thereof other than the Supply System [WPPSS]." See Exhibit 24, p. 1. See also, RCW § 43.52.360.

Moreover, unlike *U.S. Trust*, the contractual provisions allegedly impaired were not enacted by the State legislature, but were entered into by WPPSS without any Statewide review. Because the Initiative sought to bring control to a political subdivision of the State that had gone out of control, this case is much more analogous to state impairment of contracts between private parties. As this Court just stated in *Energy Reserves*, quoting from *U.S. Trust*,

> [u]nless the State itself is a contracting party . . . '[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' 51 U.S.L.W. at 4109.

Since the State is not a party to the WPPSS' contracts allegedly impaired, the Court of Appeals' premise for its application of the "reasonable and necessary" test is major constitutional error.

In any event, whether WPPSS, as a political subdivision comprised of public utilities, is more like the State of New Jersey in *U.S. Trust* or more like Kansas Power and Light, the public utility in *Energy Reserves*—and thus whether a strict or deferential application of the reasonable and necessary test is appropriate in determining the validity of any impairment of WPPSS' contracts—is a fundamental, unresolved question of constitutional law on which probable jurisdiction should be noted. *Id.* at 4109, n.14 & 4110 (deference to Kansas law).

(2) Initiative 394 is, moreover, valid even under the strict "reasonable and necessary" test *which the Court of Appeals manifestly misapplied.* There is no dispute that the goals of the Initiative constitute "significant and legitimate" public purposes as required by *Energy Reserves*, 51 U.S.L.W. at 4109, and *U.S. Trust*, 431 U.S. at 25. As applied to Projects 1-5, the Initiative sought, *inter alia*, to ensure a vote in WPPSS' future financing decisions for ratepayers who would bear the burden of

additional, multi-billion dollar debt; to force WPPSS to consider cost-effectiveness criteria in its multi-billion dollar financing decisions; and to force WPPSS to live within stated budgets. See *Energy Reserves*, 51 U.S.L.W. at 4110 (protection of ratepayers like protection of consumers). See also, U.S. Brief in 9th Cir. at 31-32 & n.51 (concession that 394 purposes are important per *U.S. Trust*).

(3) *Initiative 394 Is Reasonable.* The "reasonableness in light of the circumstances" test has two elements. First, for a law impairing contract to be "reasonable" in a Contract Clause sense, the contract must have had consequences unforeseen by the contracting parties which created unforeseen problems of public policy. *U.S. Trust*, 431 U.S. at 31-32. The element is manifestly satisfied here as evidenced by the views, in 1981, of the Senate Inquiry, Exhibit 26, bond and appellees' analysts, Exhibits 47, 54, 56-59, 102A-C, 102E-F, 104G, and appellees' own witnesses or employees [21] that the WPPSS' construction and financing program had created economic and financial problems of crisis proportions for WPPSS, the State and its citizens and that WPPSS' mismanagement and other problems were not foreseen by the contracting parties in the early 1970s. See pp. 5-6, *supra*.

Accordingly, this case is far different from *U.S. Trust*. There, the need for funds for mass transit in the New York/New Jersey area "was not a new development. . . ." "As early as 1922, over a half century ago, there were pressures to involve the Port Authority in mass transit. *It was with full knowledge of these concerns that the 1962 covenant was adopted* [by the state legislature]." 431 U.S. at 31-32. (Emphasis supplied.) Moreover, in that case the repealed covenant had been inserted in 1962

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[21] *See, e.g.*, Squire Dep., pp. 48, 69, 91-93, CR 140, Sienkiewicz Dep., pp. 16, 30; Perko Dep., pp. 22, 37-38, 67-68, CR 141; John O'Brien Dep., p. 142, CR 146; Steele Dep., pp. 15, 21, 26, CR 167; Heck Dep., pp. 16, 18, 23-24, 31, CR 168.

to trigger the Contract Clause. *Id.* at 18. *But there is not a shred of evidence in this record—and the District Court found none—that the parties to the contracts had any knowledge, much less "full knowledge," when the contracts were executed of the problems, such as WPPSS' mismanagement, which arose directly out of those contracts—problems which were, in fact, "unintended" and which, in 1981, were creating dramatic "unforeseen" problems of public policy. Id.* at 31-32. The Court of Appeals discussion here is thus in direct conflict with *U.S. Trust.* See App., p. 20a. It can only lamely state, without any citation to the record, that the "concerns addressed by the Initiative were not unknown in the early 1970s." *Id.* But this is simply inadequate as a matter of law, since the appellees had to show that the *contracting parties* had full knowledge of the problems that gave rise to the Initiative at the time the contracts were executed, especially WPPSS mismanagement.

Second, the contract modification must be "reasonable" in light of the "changed" circumstances. To satisfy this element of the "reasonableness" test, a law impairing contract must meet a set of criteria announced in *Blaisdell* and then reaffirmed and augmented in *Spannaus.* (a) The state law must be enacted to deal with a broad, generalized economic or social problem. *Spannaus,* 438 U.S. at 250; *Blaisdell,* 290 U.S. at 444. In this case, the problems created by WPPSS mismanagement satisfy that criterion without question. The Court of Appeals cites no record evidence to dispute the number and magnitude of the problems created by WPPSS. See pp. 5-6, *supra.* (b) As an important corollary, the state law must be enacted to protect "a broad societal interest rather than a narrow class." *Spannaus,* 438 U.S. 249. In this case, this criterion is satisfied, since 394 is aimed at benefiting all the citizens of the State, and not a few employees whose pension rights are altered. *Cf., Spannaus; Energy Reserves* at n.25. The Court of Appeals does not, and cannot, rebut the findings of the State Senate Inquiry that, in 1981 when 394 was under consideration,

WPPSS threatened the State's utilities, economy and well-being of its citizens. See p. 6, *supra*. *Cf.* App., pp. 18a-19a. Moreover, under *Energy Reserves*, once there is a finding of legitimate public purpose, as there is here, then that "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." 51 U.S.L.W. at 4109 & n.25. (c) The state law should, if possible, be limited in duration. *Spannaus*, 438 U.S. at 250; *Energy Reserves*, 51 U.S.L.W. at 4111. In this case, 394 meets that criterion because it requires only one vote for each Project. Initiative 394, § 4. Thus, WPPSS may issue bonds at such times and in such amounts as it deems desirable after voter approval if its cost-estimates are correct.

The Court of Appeals did not even discuss this last issue or the other "heightened reasonableness" criteria.[22] Accordingly, the Court of Appeals' decision should be summarily reversed or this Court should note probable jurisdiction because the decision below so patently misapplies the foreseeability requirement and disregards the *Blaisdell-Spannaus* criteria that are at the core of Contract Clause adjudication.

(4) *Initiative 394 is Necessary.* In addition to satisfying the "reasonableness" test, a State law that "substantially" impairs contract must also be "necessary." *U.S. Trust*, 431 U.S. at 29-30. The "necessity" test must be administered with care by the Federal judiciary because, if improperly used as it was in this case by the Court of Appeals, it can provide an unprincipled mechanism for the judiciary to substitute its own policy prefer-

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[22] *Cf.* App., p. 19a. These additional criteria are: (d) the state law must be appropriately tailored to the problems it was designed to meet; and (e) it must not modify contracts without moderation or in the spirit of oppression. *Spannaus*, 438 U.S. at 242, 250; *Blaisdell*, 290 U.S. at 445-47. Appellant showed below that 394 met these criteria. The United States did not dispute those arguments but only took the manifestly incorrect position that the *Blaisdell-Spannaus* criteria did not apply to this case. U.S. Brief in 9th Cir. at n. 59. *Cf. Energy Reserves*, 51 U.S.L.W. at 4108 & n. 11.

ences for those of the legislature or of the State's electorate as a whole acting through the initiative process. As utilized in *U.S. Trust*, the "necessity" test asks whether there was an alternative means of achieving the goals that would have been less drastic and more moderate? *U.S. Trust*, 431 U.S. at 30.[23] The Court of Appeals in a brief discussion held that the Initiative was not necessary, see App., pp. 16a-18a, but it could only do so by grossly distorting the goals of the Initiative—goals which appellees had conceded below.

(a) Section 2 of Initiative 394 expressly states that a goal of the Initiative is "to provide a mechanism for citizen review and approval of proposed financing for major public energy projects." See App., p. 26a. In other words, 394 intends that a citizens' vote shall occur because citizens will bear the ultimate cost of the additional financing. There is no less drastic means of accomplishing the goal of a citizens' vote than having a citizens' vote, and appellees suggested none below. Rather than accurately quoting the language of Section 2 of 394 or reading the uncontradicted legislative history, CR 152, the Court of Appeals distorts that goal and describes it more generally as *only* ensuring "public accountability" over WPPSS. See App., pp. 16a-17a. But this is simply impermissible—*and is an example of a willful judiciary ignoring the express language of state statute.* The Court of Appeals' ensuing discussion of alternative ways of accomplishing "public accountability" is simply without legal force or legal sense.[24]

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[23] Previous cases had generally interpreted "necessary" as "appropriate." *Blaisdell*, 290 U.S. at 444-45. See also, *Spannaus*, 438 U.S. at 242. The novel "least drastic means" formulation of *U.S. Trust* was not used in *Spannaus*. Here, in contrast to *U.S. Trust*, 431 U.S. at 29-30 & n. 28, appellees did not suggest, and the Court of Appeals did not state, that there was a "less drastic" modification of contract than the one enacted by the State.

[24] The Court of Appeals cites a State law that changes the composition of the WPPSS' Board as a less drastic alternative. But the

(b) A second goal of the Initiative, conceded by the United States, is to "require" that WPPSS consider cost-effectiveness criteria in making future financing decisions. U.S. Brief in 9th Cir. at 31-33 & n.51. See also, CR 152, ¶ 23 (Zemke Affidavit); Initiative 394, § 2. The Initiative is necessary to achievement of this goal because, as noted, at the time of its enactment WPPSS had not conducted needed cost-effectiveness studies—a fact that the Court of Appeals conveniently omits. Moreover, the Initiative's voter approval requirement is necessary because it "requires" that WPPSS, before seeking a 394 election, will consider the cost-effectiveness study mandated by the Initiative and not ignore it. Even in the face of an express concession by the United States, the Court of Appeals again distorts a goal of the Initiative. It states that "[c]ost-effectiveness studies can be required without being tied to an election requirement for the issuance of bonds previously promised." See App., p. 17a. But the Court fails to distinguish between its fallacious goal of simply requiring independent studies and the actual goal of the Initiative's drafters *of ensuring WPPSS will consider cost-effectiveness criteria.* It also fails to note that, even by the time of the District Court's ruling in June, 1982 (eight months after 394's passage), WPPSS had not even started, and BPA had not completed, cost-effectiveness studies of the Projects. Sienkiewicz Dep., pp. 74-76, 83-84, CR 142.

(c) A third goal of the Initiative, conceded by the United States is to "require WPPSS to live within stated budgets." U.S. Brief in 9th Cir. at 31-32 & n.51. The Initiative is necessary to accomplish that goal because the mere existence of the Initiative exerts budget dis-

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law cited, see App., p. 17a, was enacted in *1982*, after passage of the Initiative in November, 1981, and thus has no legal relevance to the necessity test. In addition, such Board changes are simply not a less drastic way of accomplishing the Initiative's express goal of a vote on *future* financing by *citizens* who will have to bear the additional multi-billion dollar debt.

cipline on WPPSS and because a "yes" vote establishes a debt limit that WPPSS may not exceed without another cost-effectiveness study and another election. The appellees did not even suggest a less drastic alternative for achieving this significant, legitimate goal. Refusing to accept the concession of appellee United States, the Court of Appeals' way out is to distort this goal, too. In an improper attempt to bring this case under *U.S. Trust*, the *process* goal of "imposing budget discipline" becomes the substantive goal of limiting "public spending." See App., p. 18a. But, as emphasized above, the Initiative does not, by its terms, limit spending: voters may well approve the issuance of further bonds to complete those Projects which are cost effective. What 394 does is establish a process for exerting external budget discipline on WPPSS, discipline which had been sadly lacking in the past. As to achievement of that goal, too, 394 is necessary.

Accordingly, because the Court of Appeals substituted its judgment for the judgment of the State's voters by grossly distorting 394's goals, this Court should note probable jurisdiction to establish that there are some limits on a federal court's use of "necessity" analysis to strike down state statutes.

E. The Court of Appeals' Decision Should Be Summarily Reversed Under This Court's Supervisory Power.

The District Court's summary oral findings constitute a textbook violation of Rule 52, F.R.Civ.P. (In a bench trial a District Court "shall find the facts specially and state separately its conclusions of law thereon."). It has been black letter law for forty years that broad and conclusory findings which do not reveal the basic facts upon which the District Court relied fail to satisfy the dictates of Rule 52. See App., pp. 21a-23a. *Schneiderman* v. *United States*, 320 U.S. 118, 129-131 (1943); Wright & Miller, 9 Federal Practice and Procedure, §§ 2571, 2579

(1971). Despite more than 80 pages of proposed findings by appellants, the District Court simply made no findings of "basic" facts, *inter alia*, on the legislative history of 394, the nature of any injury to any security interest, the reasonable expectations of the parties and, perhaps most importantly, the so-called "Prudent Utility Practice" standard of the contracts on which appellees rested their case.

Appellant raised the Rule 52 violation in its appellate brief (at pp. 19-21). But the Court of Appeals, rather than remanding for further findings, violated the appellate function by making findings on issues of fact that were in dispute. Most importantly, although appellees' case rested on the view that under the contracts WPPSS and BPA had to follow "Prudent Utility Practice" (PUP) in deciding whether to issue bonds and that the voters were not so bound in a 394 election, appellants introduced substantial evidence that the PUP "standard" was "impotent" and that WPPSS and BPA had not followed it, in any event, by their failure, *inter alia*, to conduct cost-effectiveness studies.[25] The meaning, if any, of the contracts' PUP standard—whether in this context it was "important" in a constitutional sense let alone "substantially modified" with no 394 election scheduled or held—was a major issue of factual dispute. But the District Court never even mentioned this concept, App., pp. 21a-23a, and the Court of Appeals improperly resolved the factual dispute without even citing to the extensive record on the issue. See, App., p. 4a, n.4.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court,

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[25] *See, e.g.*, Exhibit 110, Answer #27, Exhibit 34, p. 7, Bates Dep., pp. 56-57, 63-64, CR 132; Hoberg Dep., pp. 35, 98, 103-106; Sienkiewicz Dep., p. 95, CR 142; Akridge Dep., pp. 38, 40-50, 75, CR 149.

as to call for an exercise of this Court's supervisory power. *Cf.* Rule 17.1(a), Rules of the Supreme Court. If careful litigation of novel and important constitutional issues is to have meaning, the Court of Appeals' cavalier disregard for the record—including the legislative history of 394—must not be allowed to stand.

CONCLUSION

For the reasons stated above, this Court should either summarily reverse the decision of the Court of Appeals, vacate and remand for reconsideration in light of *Energy Reserves* or note probable jurisdiction.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. CA 82-3404

No. DC 82-395(V)T

CONTINENTAL ILLINOIS NATIONAL BANK and TRUST COMPANY OF CHICAGO, *et al.*,
Plaintiffs/Appellees,

-vs-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

-v-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant.

Jan. 11, 1983

Appeal from the United States District Court for the Western District of Washington
Honorable Jack E. Tanner, District Judge, Presiding
Argued and Submitted November 10, 1982

Before: WRIGHT, ANDERSON, and CANBY, Circuit Judges

OPINION

CANBY, Circuit Judge:

This case involves a challenge to the constitutionality of the Washington State Energy Financing Voter Approval Act, 1981 Wash. Laws (2d. Ex. Sess.) ch. 6 ("Initiative 394"), as applied to three nuclear power plants currently under construction. The initial challenge was brought by three banks[1] serving as trustees for holders of bonds previously issued to finance the construction of these projects. The Don't Bankrupt Washington Committee ("Committee"), the original proponent of Initiative 394, was permitted to intervene. The United States then filed suit challenging the Initiative on behalf of the Bonneville Power Administration ("BPA"). The Committee was also permitted to intervene in that action and the two cases were consolidated.

Plaintiffs argued that Initiative 394 violated various provisions of the federal and state constitutions. The district court held that the Initiative unconstitutionally impaired existing contractual obligations to finance and complete three nuclear power plants under construction. U.S. Const. Art. I, § 10. It did not reach the additional contentions presented. We affirm.

BACKGROUND

BPA is a federal agency charged with marketing the power produced from federal hydroelectric projects in the Columbia River Basin to 147 customers in the Pacific Northwest. In the 1960's, BPA was faced with rapidly

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[1] Morgan Guaranty Trust Company of New York is bond fund trustee for bondholders of Project 1. Continental Illinois National Bank and Trust Company of Chicago is trustee for bondholders of Project 2. Seattle-First National Bank is trustee for bondholders of Project 3.

increasing demand for power and concluded that it would be unable to meet the future needs of its customers from existing facilities. As a result, BPA embarked upon a program under which certain of its customers were to build and operate the additional power plants needed to meet the anticipated demand. One segment of the program provided for BPA's "preference customers" (public utilities and cooperatives) to construct power projects that would be integrated into BPA's system without BPA's owning or operating the projects.

The Washington Public Power Supply System ("WPPSS") is the builder of three nuclear power plants to be operated by it as part of the BPA program. WPPSS is a municipal corporation of the State of Washington known as a "joint operating agency." [2] It is comprised of 19 public utility districts and 4 municipalities, all of which are also political subdivisions of the State. During the early 1970's WPPSS entered various agreements to enable it to build and operate the plants. Those agreements and the provisions of state law in existence at the time they were executed contain the obligations of contract allegedly impaired by Initiative 394. The agreements fall into three categories.

The first category consists of project agreements between BPA and WPPSS governing the construction and operation of each of the three plants.[3] The project agree-

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[2] WPPSS was created in 1957 pursuant to Wash. Rev. Code § 43.52.360 which provides, in part:

> Any two or more cities or public utility districts or combinations thereof may form an operating agency (herein sometimes called joint operating agency) for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities and extensions thereof, for the generation and/or transmission of electric energy and power. Each such agency shall be a municipal corporation of the state of Washington with the right to sue and be sued in its own name.

[3] There is also an ownership agreement for project Number 3.

ments allow BPA to oversee certain aspects of construction including budgets and termination. BPA is authorized to disapprove "significant action" taken by WPPSS if BPA concludes that the action is inconsistent with "Prudent Utility Practice."[4] If WPPSS and BPA are unable to agree on the proposed action, the matter is referred to an independent "project consultant." The project consultant is authorized to resolve the dispute in accordance with the Prudent Utility Practice standard. There is little doubt that a decision not to finance the projects through to completion would be a "significant action" subject to disapproval if it did not meet the Prudent Utility Practice standard. In addition, the project agreements specifically obligate WPPSS to "use its best efforts to issue and sell bonds to finance the costs" of construction of each plant.

The second category of agreement entered by WPPSS consists of "Net Billing Agreements" between WPPSS, BPA and other "participants," who are BPA customers. Like the project agreements, the Net Billing Agreements require WPPSS to construct and operate the plants in accordance with Prudent Utility Practice. They also make

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[4] "Prudent Utility Practice" is defined in the project agreements as:

> any of the practices, methods and acts, which, in the exercise of reasonable judgment in light of the facts (including but not limited to practices methods and acts engaged in or approved by a significant portion of the electrical utility industry prior thereto) known at the time the decision was made, would have been expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety and expedition.

Defendants argue that Prudent Utility Practice is a non-standard. The standard is quite flexible. The project agreements further state that "Prudent Utility Practice is not intended to be limited to the optimum practice, method or act, to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts." We need not attempt to define its contours. It is sufficient to note that it is the standard to which the parties agreed.

each participant liable for a share of the construction and financing costs of the project equal to that participant's share of anticipated power output. Under the agreements, the participants assign their share of anticipated output to BPA in return for credit for an equal amount of power on their wholesale bill from BPA. BPA in turn assumes each participant's obligation to pay its share of the construction and financing costs of the project. The result of the Net Billing Agreements, then, is that BPA receives essentially all the power[5] to be produced by the three plants, and undertakes to pay the construction and financing costs of the projects whether or not any power ultimately is produced by the plants. Those costs BPA would presumably pass on to its ratepayers throughout the Northwest. This obligation of BPA to pay the costs of constructing the plants regardless of output makes the protections of the project agreements extremely important to BPA. The project agreements enable BPA to prevent a termination of construction by WPPSS unless that termination is consistent with Prudent Utility Practice.

The third category of agreement entered by WPPSS consists of promises to bond purchasers, made in the form of bond resolutions and the state statutes giving them effect. WPPSS issued revenue bonds, payable solely from the income derived by WPPSS from its ownership and operation of the power plants.[6] The bond resolutions assured bondholders that WPPSS was "duly authorized under all applicable laws to create and issue the bonds and to adopt [the resolutions]." The authorizing section of the resolutions permitted the issuance of future bonds

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[5] BPA will receive only 70% of the power from one of the plants (Number 3) at issue here because the remaining 30% is owned by nonparticipants.

[6] The bond resolutions stated that the bonds were revenue bonds to be paid solely from "income, revenues, receipts and profits derived by the Supply System through the ownership and operation by it of the project."

"in such amounts and from time to time as may be required to pay the costs of construction." The resolutions contain covenants by WPPSS that it would "take all lawful measures required to issue and sell" the additional bonds required to complete the project. WPPSS also agreed to "use its best efforts to issue and sell Bonds to finance the costs of the project and the completion thereof." It covenanted that it would "proceed with all reasonable diligence to and will construct to completion the project and complete such construction at the earliest practical time."

WPPSS' promises to use best efforts to sell bonds and to proceed with diligence to completion are important to the bondholders, of course, because the bonds are payable from revenues produced by operation of the plants. It is true that the bondholders are also protected by BPA's obligation under the Net Billing Agreements to pay the costs of construction including its financing, but that fact does not render the promises of completion unimportant to the bondholders. Sale of power is still an important source of repayment of the bonds. The bond resolutions themselves recognized that operation of each project is "essential to the payment and security of the Bonds."

INITIATIVE 394

Initiative 394 was enacted at the Washington general election of November 3, 1981, in response to cost overruns and construction delays at five [7] nuclear power plants then under simultaneous construction by WPPSS.[8] Initiative

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[7] Two additional plants were begun after the three noted earlier. BPA was not involved in those projects and work on them has been halted for the time being.

[8] The original total estimated cost for all five WPPSS projects was approximately $4 billion. As of May 1981 the estimated total cost for the five projects was $24 billion. The original estimate for the three plants at issue here was $1.9 billion. As of May 1981 the estimated total cost for those three plants was $12 billion.

394 applies only to future projects and those projects still under construction as of July 1, 1982, that have exceeded their first official agency budget estimates by more than 200%. All three WPPSS power plants at issue here fall into the latter category.

The heart of the Initiative is contained in section 4. That section provides that no public agency may issue or sell bonds to finance construction or acquisition of any major public energy project "unless it has first obtained authority for the expenditure of the funds to be raised by the sale of such bonds for that project at an election" conducted in accordance with the Initiative.[9] Other provi-

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[9] The major provisions of Initiative 394 are the following:

New Section. Sec. 2.

The purpose of this chapter is to provide a mechanism for citizen review and approval of proposed financing for major public energy projects. The development of dependable and economic energy sources is of paramount importance to the citizens of the state, who have an interest in insuring that major public energy projects make the best use of limited financial resources. Because the construction of major public energy projects will significantly increase utility rates for all citizens, the people of the state hereby establish a process of voter approval for such projects.

New Section. Sec. 3.

The definitions set forth in this section apply throughout this chapter unless the context clearly requires otherwise.

* * * *

(2) "Major public energy project" means a plant or installation capable, or intended to be capable, of generating electricity in an amount greater than two hundred fifty megawatts. Where two or more such plants are located within the same geographic site, each plant shall be considered a major public energy project. An addition to an existing facility is not deemed to be a major energy project unless the addition itself is capable, or intended to be capable, of generating electricity in an amount greater than two hundred fifty megawatts. A project which is under construction on July 1, 1982, shall not be considered a major public energy project unless the official agency budget or estimate for total construction costs for the project as of July 1, 1982, is more than two hundred percent

sions of the Initiative require the public agency to hire an independent consultant to prepare a draft cost-

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of the first official estimate of total construction costs as specified in the senate energy and utilities committee WPPSS inquiry report, volume one, January 12, 1981, and unless, as of July 1, 1982, the projected remaining costs of construction for that project exceeds two hundred million dollars.

* * * *

New Section. Sec. 4.

No public agency or assignee of a public agency may issue or sell bonds to finance the cost of construction or the cost of acquisition of a major public energy project, or any portion thereof, unless it has first obtained authority for the expenditure of the funds to be raised by the sale of such bonds for that project at an election conducted in the manner provided in this chapter.

New Section. Sec. 5.

The election required under section 4 of this act shall be conducted in the manner provided in this section.

* * * *

(4) Prior to an election under this section, the applicant shall submit to the secretary of state a cost-effectiveness study, prepared by an independent consultant approved by the state finance committee, pertaining to the major public energy project under consideration. The study shall be available for public review and comment for thirty days. At the end of the thirty-day period, the applicant shall prepare a final draft of the study which includes the public comment, if any.

* * * *

New Section. Sec. 7.

A request for financing authority pursuant to this chapter shall be considered approved if it receives the approval of a majority of those voting on the request.

* * * *

New Section. Sec. 11.

Section 8 of this act shall take effect immediately. The remainder of this act shall take effect on July 1, 1982. Public agencies intending to submit a request for financing authority under this act are authorized to institute the procedures specified in section 5(4) of this act prior to the effective date of this act.

Filed January 20, 1981.

effectiveness study, followed by a period of public comment and issuance of a final draft study. The election then is held and voters within the districts encompassed by the agency and its members are entitled to vote. Bonds may not be issued in excess of the amounts of funds authorized by the voters and, of course, if the proposal is voted down no bonds may issue at all.

The Initiative alters WPPSS's functioning in two ways. Prior to the Initiative's enactment there was no explicit requirement that WPPSS obtain cost-effectiveness studies for its projects. Arguably, however, such studies were encompassed in the "Prudent Utility Practice" standard which governed both WPPSS's operation and BPA's limited oversight of WPPSS. A more important change arises from the fact that the only pre-Initiative statute governing WPPSS' bond issuing authority was Wash. Rev. Code § 43.52.3411. That statute authorized WPPSS to issue bonds payable from the revenues of the utility projects whenever its board deemed it advisable. Initiative 394 accordingly imposes a substantial new hurdle to the sale of bonds essential to WPPSS' completion of the three plants. Plaintiffs argue that by conditioning WPPSS's ability to issue bonds on the outcome of a popular referendum, Initiative 394 impermissibly impairs WPPSS's obligations under the project agreements, the Net Billing Agreements, and the bond resolutions.

CONTRACTS CLAUSE

Article I, Section 10, Clause 1 of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." To determine whether Initiate 394 violates the contract clause, we must address two major issues. First, we must determine whether the Initiative substantially impairs WPPSS's contractual obligations to BPA or the bondholders. Second, we must determine whether the Initiative, if it substantially impairs those obligations, is

nevertheless justified as a reasonable and necessary exercise of the State's sovereign power. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

IMPAIRMENT

Defendants argue that Initiative 394 did not substantially impair any of WPPSS's contractual obligations. Conceding that the Initiative does alter WPPSS's ability to issue bonds, they contend that the possibility of such an alteration was contemplated at the time the agreements were made. If in fact the contracts in question did allow for such an alteration, then the Initiative does not substantially impair them. *See Northwestern Nat'l Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980). We do not agree, however, that the contracts can reasonably be read as contemplating the kind of alteration of WPPSS's bonding authority effected by Initiative 394.

Defendants point to the provision of the bond resolutions in which WPPSS covenanted to "take all *lawful* measures required to issue and sell" the additional bonds (emphasis added). They also rely on the provision of the project agreements that promises that WPPSS will use its best efforts to sell bonds to finance completion provided "that in each case such Projects Bonds *may then be legally issued and sold*" (emphasis added). We realize that the defendants' arguments, particularly with regard to the latter provision, are not without force. We nevertheless believe that both provisions may be read most reasonably as promises of compliance with regular and broadly applicable bonding requirements of the state for the issuance of bonds. It is less reasonable to interpret them as leave for the state to impose a more narrowly targeted requirement of success in a popular referendum as a condition for further bonding authority by WPPSS.

We confess that our conclusion is influenced by what we perceive as the central aspect of the agreements before us. The contracting parties agreed at the outset that additional power resources were needed. The object of the agreements was to provide those resources. WPPSS recognized the importance of completion to BPA [10] and the bondholders,[11] and BPA agreed in effect to repay the bonds regardless whether the plants were completed. The bondholders therefore had a promise of payment even without the plants, but completion of the plants unquestionably will make more energy available to finance repayment. WPPSS agreed to finish the plants with all reasonable diligence, which it clearly cannot do without issuing more bonds. In a very practical sense, the promise of completion was the only consideration BPA received for agreeing to pay the construction and financing costs. Its entitlement to the energy produced—BPA's sole benefit from the entire set of agreements—is renderd valueless if the plants are not completed. WPPSS's ability to issue additional bonds was accordingly the centerpiece of the entire arrangement. We have difficulty reading the provisions of the contracts in a way that permits destruction of their primary purpose. A promise in a contract that gives one party the power "to deny or change the effect of the promise, is an absurdity." *United States Trust Co. v. New Jersey*, 431 U.S. at 25 n. 23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877)).

Defendants also contend that there is no impairment because of Wash. Rev. Code 43.52.3411 ("Section 3411"), the statute that authorizes agencies such as WPPSS to issue bonds. That statute provides that, with one exception not relevant here, "all the provisions of law as now

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[10] The project agreements recite that the generating capacity of the plants would assist BPA in attaining the objectives of the Bonneville Power Act.

[11] The bond resolutions recognized that operation of each project was "essential to the payment and security of the bonds."

or hereafter in effect relating to revenue bonds or warrants of public utility districts shall apply to revenue bonds or warrants issued by the joint operating agency including, without limitation, provisions relating to: . . . the time and place of payment of such bonds or warrants and the interest rates or rates thereon; the covenants that may be contained therein and the effect thereof . . . ." Defendants focus on the words "now or hereafter" and contend that Section 3411 constitutes a reservation of state authority to make the changes imposed by Initiative 394. In our view, this contention overreads the statute.

The meaning and application of a state statute that is challenged as violating the contracts clause is a question of federal law. *Coombes v. Gertz*, 285 U.S. 34, 441 (1932); *see American Toll Bridge Co. v. Railroad Comm'n*, 307 U.S. 486, 490 (1939); *Rapid Transit Corp. v. New York*, 303 U.S. 573, 593 (1938). That rule necessarily extends to Section 3411 insofar as that statute dictates the application of Initiative 394 to the contracts in issue here.

The provisions of Section 3411 relied upon by defendants to establish a reservation of state power to modify contracts are ambiguous. The State has on occasion enacted statutes which explicitly exempted or subjected bond issues to the effects of subsequently enacted laws. *Compare* Wash. Rev. Code § 53.34.120 (state covenants not to limit or alter vested rights of certain specified bondholders) *with* Wash. Const. art. XII, § 1 (all laws relating to corporations may be altered at any time). Defendants argue that any ambiguity in the provisions at issue here should be resolved in favor of the State. We cannot agree. Although contracts which affect the public interest are interpreted so as to favor the State, when the State borrows money the State is not acting entirely in its sovereign capacity. Thus, insofar as the purely financial aspects of the agreement are concerned, reservations are not to be lightly inferred. *United*

States Trust v. New Jersey, 431 U.S. at 25 n. 23; *see Restatement (Second) of Contracts* § 207 comment a.

We conclude that the effect of Section 3411 simply is to render applicable to future bond issues the requirements of state law then in existence so long as imposition of those requirements does not modify pre-existing contracts. We do not read it as a reservation of power applicable to the contracts at issue here. While the State unquestionably may reserve power to change some aspects of existing contracts, *see Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084 (5th Cir. 1981), the State has not specifically done so here. Moreover, to interpret Section 3411 as a broad reservation of power is not permissible when the statute is viewed in light of of the contract clause. For example, Section 3411 could not sensibly be construed to permit the State to change by law the interest rates or redemption schedules applicable to previously issued bonds. *See United States Trust Co. v. New Jersey, supra*, 431 U.S. at 27-28. Section 3411 therefore cannot be applied as broadly and retrospectively as its literal language may suggest. It is a closer question whether it can be applied to allow the State to restrict a future bond issue in a manner contrary to the provisions of pre-existing contracts. We conclude that it cannot be so applied, at least in the direction dictated by Initiative 394. Section 3411 may doubtless apply many of the technical requirements of the State's bond laws to bonds issued by WPPSS in the future. Initiative 394 may itself be applied, so far as the contract clause is concerned, to future bond issues for projects not subject to the contractual constraints binding the projects in issue here. But Section 3411 does not, in our view, reserve to the State the power to apply Initiative 394 to the additional bond issues of WPPSS that were promised in the contracts before us, and that remain central to the accomplishment of their purpose.

Defendants argue that Initiative 394 did not simply affect financial obligations. They contend that it altered the structure of governance of one of the State's political subdivisions, an act inherently within the sovereign's power. The Initiative did alter the type of control the electorate could exercise over WPPSS. But the voters always had ultimate control, direct or indirect, over WPPSS by the power to elect its board. The Initiative simply altered the manner in which WPPSS can raise money. The new method does involve voter approval, but it is still the method of financing that is being altered.

Defendants also argue that a municipal corporation, such as WPPSS remains subject to state regulation and cannot be allowed to contract itself out from state control. That argument misperceives the nature of the restriction on state action imposed by the contract clause. As a creature of the state a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate) is not free to alter the corporation's ability to perform. *Louisiana ex rel. Hubert v. New Orleans*, 215 U.S. 170, 175-78 (1909); *Wolff v. New Orleans*, 103 U.S. 358, 365-68 (1880); *see United States Trust*, 431 U.S. at 24 n. 22. WPPSS remains subject to state regulation, but if the State significantly alters WPPSS's ability to perform previously negotiated agreements, it impairs obligations of contract.

Since we have concluded that neither the contracts themselves nor Wash. Rev. Code 43.52.3411 permit the state to modify the contractual obligations along the lines dictated by Initiative 394, we must next address the question whether Initiative 394 constitutes a substantial impairment of those obligations. It largely follows from what has already been said that the impairment is substantial. The issuance of additional bonds by WPPSS is

essential to the performance of its contracts; it is particularly crucial to the obligation running from WPPSS to BPA. Prior to Initiative 394, the issuance of additional bonds was within the discretion of the board of directors of WPPSS. BPA had the right to ensure that the discretion was exercised in accordance with Prudent Utility Practice. An abandonment of the project was consequently likely to occur only if events caused such abandonment to be in BPA's interests as a distributor of power. Initiative 394 adds a new and unpredictable element. Bonds necessary for completion of the projects can only be issued after approval of the proposed expenditure of the proceeds by the electorate at a popular referendum. No standard can be imposed on the electorate in exercising its decision, nor can it be subjected to any review. It can reject the proposal for any reason or no reason. The addition of the referendum requirement is, we conclude, a severe impairment that defeats the expectations of the parties under their contracts. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Nor do we view Initiative 394 as an insubstantial impairment prior to the time that the voters actually turn down a proposed bond issue. Defendants argue that the district court made inadequate findings to support its conclusion that the very existence of Initiative 394 injured plaintiffs by lowering the market value of WPPSS bonds and thereby increasing the costs of construction. They also contend that there was no real loss to the bondholders because they still have BPA's promise of payment. We need not fix with certainty, however, any loss in value of bonds caused by the existence of Initiative 394. It is sufficient that the additional requirements imposed by Initiative 394 impair the ability of WPPSS to carry out its covenants in the manner originally promised. *United States Trust Co. v. New Jersey, supra*, is conclusive on that point. In that case, the Supreme Court held that the fact that the bondholders' security provision impaired by the state was of little value was irrelevant to the con-

stitutional determination. Absent the payment of just compensaion, the repeal of a particular security provision impaired an obligation of contract even though the bondholders might have retained other contractual security. 431 U.S. at 18-19. As in *United States Trust*, the covenants at issue here were not superfluous. Plaintiffs were promised financing of the plants to completion, subject only to contractually specified conditions. That promise was clearly an inducement to contract. *Cf. El Paso v. Simmons*, 379 U.S. 497 (1965) (unlimited redemption period could be changed by statute to five year redemption period when original provision was not an inducement to contract). Plaintiffs were not compensated for modification of that central provision. Initiative 394 impairs the obligation by imposing the election requirement, and that requirement is a present injury not dependent on the outcome of such an election.

JUSTIFICATION

Having concluded that Initiative 394 does impair WPPSS's contractual obligations, we must determine whether the degree of that impairment is both reasonable and necessary to achieve a valid state interest. *United States Trust, supra* 431 U.S. at 29. Our determination whether the State's action is justified is affected by the fact that WPPSS is itself a political subdivision of the State, made up of other political subdivisions. We cannot view the contracts between WPPSS and the plaintiffs as those between private parties. Because the State is a contracting party, we give less deference to its claims of justification for impairment. *Id.* at 25-26.

We emphasize that the State has not attempted to justify Initiative 394 as an exercise of the State's sovereign prerogative to protect the health and safety of its citizens. Considerations of health and safety did not give rise to the Initiative, and are not offered in justification of it. Instead, defendants propose five public

purposes served by Initiative 394. Essentially the five reduce to three related goals: ensuring WPPSS's public accountability; ensuring public accountability in all decisions affecting the energy and economic future of the State; and protecting the State's finances by placing controls on WPPSS's spending.[12]

Achievement of public accountability is certainly a legitimate public purpose. It is not clear, however, that Initiative 394 is either reasonable or necessary to achieve it. The Initiative was not necessary to give the public control over either WPPSS or energy and economic decision-making generally. Through the election process, the voters have always had direct or indirect control of both. At least one alternative method of achieving public accountability has actually been adopted. *See, e.g.*, 1982 Wash. Laws (1st Ex. Sess.) ch. 43 (requiring joint operating agencies to form executive boards with outside membership). Others remain available. Cost effectiveness studies can be required without being tied to an election requirement for the issuance of bonds previously promised.[13] The existence of such alternative means of

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[12] At oral argument plaintiffs attempted to justify the Initiative in part because the large amounts of bonds issued by WPPSS had made it difficult for the State to sell its own bonds. Protecting the marketability of state-issued bonds is a valid state purpose, but the contract clause was intended to ensure that the State pursues that purpose in an evenhanded manner. Initiative 394 does not attempt to limit all private borrowing; its retroactive effect is limited to altering WPPSS's ability to issue bonds. The State's argument emphasizes the fact that the State is attempting to protect its fund-raising power by limiting WPPSS's obligation to finance its projects. *See United States Trust*, 431 U.S. at 26.

[13] Initiative 394 contained a cost effectiveness study requirement. Despite the existence of a severability clause (Section 10) the District Court held that the statute was not severable and invalidated the entire Initiative. We do not address the correctness of that holding because counsel have represented to the court that WPPSS has already undertaken to obtain cost effectiveness studies for the three projects currently under construction. Inasmuch as

achieving accountability cast doubt on the validity of Initiative 394's application to the obligations in issue here. *See United States Trust Co.*, 431 U.S. at 29-31 & n. 28. *Cf. El Paso v. Simmons*, 379 U.S. 497, 516-17 (1965) (retroactive application "quite clearly necessary" to achieve state's purpose.).

Limitation of public spending is also certainly a legitimate state goal, but its weight is diminished in contract clause analysis when the state limits its own previous financial commitments. As the Supreme Court declared in *United States Trust*:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State reduced its financial obligations whenever it wanted to spend the money for what it regarded was an important public purpose, the Contracts Clause would provide no protection at all.

431 U.S. at 26 (footnote omitted). These words are no less applicable when the purpose of an impairment is merely saving money, as here, rather than spending it for a broad public purpose (mass transportation) as in *United States Trust*. Reduced to bare essentials, the State's financial argument in support of Initiative 394 is that completion of the projects as contracted by WPPSS had become too expensive.

Even in the light of the severe cost overruns and lengthy construction delays associated with the WPSS projects, Initiative 394 does not appear to be a reasonable measure if applied to the contracts before us. The Initiative seems somewhat narrowly targeted to modify

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the contracts clause challenge goes only to the statute's retroactive application to existing obligations, the severability issue is moot.

those very contracts, rather than being part of a broad public program with incidental impairing effects. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Supreme Court invalidated a statute that altered the pension plan liabilities of employers who either terminated a pension plan or closed a Minnesota office. The statute, intended to protect discharged workers, essentially required the employer to assure all employees of at least ten years standing a full pension regardless of the vesting provisions of any existing plan. Stressing the fact that the severe disruption of contractual obligations was unexpected and served only a relatively narrow public interest, the Court held that not even the presumption favoring legislative judgments as to necessity and reasonableness could save the act.

The *Spannaus* Court contrasted the facts of *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934), in which a temporary provision extending mortgage redemption periods was upheld. That emergency measure, enacted in response to the economic conditions of the 1930's, protected a basic societal interest rather than a favored group. Moreover, it imposed reasonable conditions, many of which were designed to protect the creditors whose rights were affected.

Defendants argue that unlike *Spannaus* this case involves an area historically regulated by the State and that state regulation altering contractual obligations was therefore foreseeable. It is true that the State has historically regulated power production and the operation of its political subdivisions. The State's regulation is not necessarily more foreseeable, however, than state regulation of a port authority and mass transportation involved in *United States Trust, supra*, where the State's impairment of bond obligations was nevertheless struck down.

Plaintiffs argue that the cost overruns and delays which prompted passage of the Initiative were of such a mag-

nitude as to compare with the economic conditions present in *Blaisdell*. We cannot agree. The concerns addressed by the Initiative were not unknown in the early 1970's. In *Blaisdell* the State, acting in its sovereign capacity adopted a balanced and temporary measure designed to protect broad societal interests which were threatened by the unforeseeable collapse of the world economy. In contrast, Initiative 394 sacrifices the interest of parties to contracts with the State's subdivision in order to protect the State's own finances. We cannot conclude that this imposed sacrifice was reasonable in light of changed circumstances. *Compare United States Trust*, 431 U.S. at 31-32 with *El Paso v. Simmons*, 379 U.S. at 515.

We therefore hold that the contract clause of the United States Constitution prohibits the application of Initiative 394 to the three WPPSS projects at issue in this appeal. Our disposition makes it unnecessary to address other grounds urged by plaintiffs in support of the district court's decision. The judgment of the district court is AFFIRMED.

[1] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C82-94

Consolidated with
No. C82-395V

CONTINENTAL ILLINOIS NATIONAL
BANK & TRUST CO. OF CHICAGO, *et al.*,
Plaintiff,

-vs-

STATE OF WASHINGTON, *et al.*,
Defendant.

TRANSCRIPT OF PROCEEDINGS beginning on Monday, June 28, 1982, at 9:00 o'clock, a.m., at Tacoma, Washington, before the Honorable Jack E. Tanner, a United States District Judge. . . . .

* * * *

[Excerpts of Transcript of June 29, 1982 follow.]

[p. 233] [JUDGE TANNER:] I now turn to the disputed findings of fact [p. 224] that commence on Page 30 of the amended pretrial order. The plaintiff trustees contend that they are authorized to bring this action on behalf of the holders of bonds sold to finance construction of Projects 1, 2, and 3. I have already made that finding, that they have standing. The plaintiff trustees contend that Initiative 394 has injured bondholders of Projects 1, 2, and 3 bonds by among other things (a) immediately impairing their contractual rights, (b) reducing the security for their bonds, (c) creating uncertainty as to the

ability of the Supply System to finance the completion of each project, and (d) reducing the value of their bonds on the secondary market. I find that the evidence supports those contentions of the trustees by a preponderance of the evidence.

Turning now to Page 31 of the disputed facts of the amended pretrial order, the plaintiff United States contends that Initiative 394 has injured Bonneville by, among other things, (a) immediately impairing its contractual rights, (b) substantially increasing the risk assumed by Bonneville under the various contracts relating to Projects 1, 2, and 3, (c) increasing the cost of constructing each project, and (d) interferring with Bonneville's statutory and contractual obligations to provide an adequate, reliable electricity supply at [p. 225] the lowest cost for its customers throughout the Pacific Northwest region. I find by a preponderance of the evidence that Bonneville, the plaintiff Bonneville's contentions are supported by the evidence, by a preponderance of the evidence.

Having then found, and I so do, that there has been an impairment of contract between the trustees, Bonneville, and the Supply System, that there is a substantial impairment, a substantial changing modifying, and outright repeal of the covenants and resolutions and the terms of the contract then existing and still in existence between the parties, and therefore there is a substantial impairment.

Now turning to the question that I must, if there is a substantial impairment, is it reasonable and necessary in the exercise of the police power of the State of Washington in view of all the facts and circumstances of this case. 394 is retroactive, which includes the contract involved in projects 1, 2, and 3. In referring to the threshold question the Court's answer to is there a valid contract between the parties in both cases, the evidence is uncontracted that there is, no dispute about that. The

question does 394 substantially impair the provisions and terms of the existing contract, the Court finds that it does. And if so, is [p. 226] the impairment permissible under Article I, Section X of the United States Constitution. The plaintiffs in this case have the burden of showing by a preponderance of the evidence the injury, the damage, and causation. I think the preponderance shows that. In reading United States Trust and applying the principles that the Supreme Court implied in that case, I should say that this Court cannot find that 394 is reasonable and necessary under the guidelines and terms set forth in the United States Trust case.

So it is the opinion of this Court that Initiative 394, now codified under 8052 of RCW 80.52 is unconstitutional as applied to Projects 1, 2 and 3. Judgment will be entered in favor of both plaintiffs in each case, and an injunction will issue in both cases enjoining defendants from applying or attempting to apply the terms of Initiative 394 against Projects 1, 2, and 3. I think that disposes of the case. . . . .

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. CA 82-3404

No. DC 82-395(V)T

CONTINENTAL ILLINOIS NATIONAL BANK
and TRUST COMPANY OF CHICAGO, *et al.*,
Plaintiffs/Appellees,

-vs-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

-vs-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Don't Bankrupt Washington Committee, intervenor-appellant, appeals from the

final order declaring Initiative 394 (Washington State Energy Financing Voter Approval Act, chapter 6, 1981 Wash. Laws (2d ex. sess.)) unconstitutional under the Contract Clause of the United States Constitution. U.S. Const. Art. I, § 10, cl. 1. This order was entered on January 11, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

/s/ Ben W. Heineman, Jr.
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/s/ Stimson Bullitt
STIMSON BULLITT
Riddell, Williams, Bullitt
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Dated: January 20, 1983

[Certificate of Service Omitted in Printing]

ENERGY PROJECTS—FINANCING—VOTER APPROVAL

CHAPTER 6

INITIATIVE MEASURE NO. 394

As Act relating to energy facilities; adding a new chapter to Title 80 RCW; and providing an effective date.

Be it enacted by the People of the State of Washington:

New Section. Section 1.

This chapter may be cited as the Washington state energy financing voter approval act.

New Section. Sec. 2.

The purpose of this chapter is to provide a mechanism for citizen review and approval of proposed financing for major public energy projects. The development of dependable and economic energy sources is of paramount importance to the citizens of the state, who have an interest in insuring that major public energy projects make the best use of limited financial resources. Because the construction of major public energy projects will significantly increase utility rates for all citizens, the people of the state hereby establish a process of voter approval for such projects.

New Section. Sec. 3

The definitions set forth in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Public agency" means a public utility district, joint operating agency, city, county, or other state governmental agency, entity, or political subdivision.

(2) "Major public energy project" means a plant or installation capable, or intended to be capable, of generating electricity in an amount greater than two hundred

fifty megawatts. Where two or more such plants are located within the same geographic site, each plant shall be considered a major public energy project. An addition to an existing facility is not deemed to be a major energy project unless the addition itself is capable, or intended to be capable, of generating electricity in an amount greater than two hundred fifty megawatts. A project which is under construction on July 1, 1982, shall not be considered a major public energy project unless the official agency budget or estimate for total construction costs for the project as of July 1, 1982, is more than two hundred percent of the first official estimate of total construction costs as specified in the senate energy and utilities committee WPPSS inquiry report, volume one, January 12, 1981, and unless, as of July 1, 1982, the projected remaining cost of construction for that project exceeds two hundred million dollars.

(3) "Cost of construction" means the total cost of planning and building a major public energy project and placing it into operation, including, but not limited to, planning cost, direct construction cost, licensing cost, cost of fuel inventory for the first year's operation, interest, and all other costs incurred prior to the first day of full operation, whether or not incurred prior to the effective date of this act.

(4) "Cost of acquisition" means the total cost of acquiring a major public energy project from another party, including, but not limited to, principal and interest costs.

(5) "Bond" means a revenue bond, a general obligation bond, or any other indebtedness issued by a public agency or its assignee.

(6) "Applicant" means a public agency, or the assignee of a public agency, requesting the secretary of state to conduct an election pursuant to this chapter.

(7) "Cost-effective" means that a project or resource is forecast:

(a) To be reliable and available within the time it is needed; and

(b) To meet or reduce the electric power demand of the intended consumers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative project or resource, or any combination thereof.

(8) "System cost" means an estimate of all direct costs of a project or resource over its effective life, including, if applicable, the costs of distribution to the consumer, and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as are directly attributable to the project or resource.

New Section. Sec. 4.

No public agency or assignee of a public agency may issue or sell bonds to finance the cost of construction or the cost of acquisition of a major public energy project, or any portion thereof, unless it has first obtained authority for the expenditure of the funds to be raised by the sale of such bonds for that project at an election conducted in the manner provided in this chapter.

New Section. Sec. 5.

The election required under section 4 of this act shall be conducted in the manner provided in this section.

(1) (a) If the applicant is a public utility district, joint operating agency, city, or county, the election shall be among the voters of the public utility district, city, or county, or among the voters of the local governmental entities comprising the membership of the joint operating agency.

(b) If the applicant is any public agency other than those described in subsection (1) (a) of this section, or is

an assignee of a joint operating agency and not itself a joint operating agency, the election shall be conducted state-wide in the manner provided in Title 29 RCW for state-wide elections.

(2) The election shall be held at the next state-wide general election occurring more than ninety days after submission of a request by an applicant to the secretary of state unless a special election is requested by the applicant as provided in this section.

(3) If no state-wide election can be held under subsection (2) of this section within one hundred twenty days of the submission to the secretary of state of a request by an applicant for financing authority under this chapter, the applicant may request that a special election be held if such election is necessary to avoid significant delay in construction or acquisition of the energy project. Within ten days of receipt of such a request for a special election, the secretary of state shall designate a date for the election pursuant to RCW 29.13.010 and certify the date to the county auditor of each county in which an election is to held under this section.

(4) Prior to an election under this section, the applicant shall submit to the secretary of state a cost-effectiveness study, prepared by an independent consultant approved by the state finance committee, pertaining to the major public energy project under consideration. The study shall be available for public review and comment for thirty days. At the end of the thirty-day period, the applicant shall prepare a final draft of the study which includes the public comment, if any.

(5) The secretary of state shall certify the ballot issue for the election to be held under this section to the county auditor of each county in which an election is to be held. The certification shall include the statement of the proposition as provided in section 6 of this act. The

costs of the election shall be relieved by the state in the manner provided for state measures under RCW 29.13.047.

(6) Prior to an election under this section, the secretary of state shall provide an opportunity for supporters and opponents of the requested financing authority to present their respective views in a voters' pamphlet which shall be distributed to the voters of the local governmental entities participating in the election. Upon submission of an applicant's request for an election pursuant to this section, the applicant shall provide the secretary of state with the following information regarding each major public energy project for which the applicant seeks financing authority at such election, which information shall be included in the voters' pamphlet:

(a) The name, location, and type of major public energy project, expressed in common terms;

(b) The dollar amount and type of bonds being requested;

(c) If the bond issuance is intended to finance the acquisition of all or a portion of the project, the anticipated total cost of the acquisition of the project;

(d) If the bond issuance is intended to finance the planning or construction of all or a portion of the project, the anticipated total cost of construction of the project;

(e) The projected average rate increase for consumers of the electricity to be generated by the project. The rate increase shall be that which will be necessary to repay the total indebtedness incurred for the project, including estimated interest;

(f) A summary of the final cost-effectiveness study conducted under subsection (4) of this section;

(g) The anticipated functional life of the project;

(h) The anticipated decommissioning costs of the project; and

(i) If a special election is requested by the applicant, the reasons for requesting a special election.

New Section. Sec 6.

The proposition for each major public energy project listed upon a ballot pursuant to this chapter shall be in the form provided in this section.

(1) If the funds are intended to finance the planning or construction of all or a portion of the project, the proposition shall read substantially as follows:

> "Shall (name of applicant) be authorized to spend (dollar amount of financing authority requested) to construct the (name of the project) (type of project) located at (location), the anticipated total construction cost of which is (anticipated cost of construction)?"

(2) If the financing authority is intended to finance the acquisition of all or a portion of the project from another party, the proposition shall read substantially as follows:

> "Shall (name of applicant) be authorized to spend (dollar amount of financing authority requested) to acquire the (name of project) (type of project) located at (location), the anticipated total acquisition cost of which is (anticipated cost of acquisition)?"

New Section. Sec. 7.

A request for financing authority pursuant to this chapter shall be considered approved if it receives the approval of a majority of those voting on the request.

New Section. Sec. 8.

In planning for future energy expenditures, public agencies shall give priority to projects and resources which are cost-effective. Priority for future bond sales to finance energy expenditures by public agencies shall be given: First, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel-conversion efficiency; and fourth, to all other resources. This section does not apply to projects which are under construction on the effective date of this section.

New Section. Sec. 9.

Sections 1 through 8 of this act shall constitute a new chapter in Title 80 RCW.

New Section. Sec. 10.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

New Section. Sec. 11.

Section 8 of this act shall take effect immediately. The remainder of this act shall take effect on July 1, 1982. Public agencies intending to submit a request for financing authority under this act are authorized to institute the procedures specified in section 5(4) of this act prior to the effective date of this act.

Filed, January 20, 1981.

Generally effective July 1, 1982; Section 8 effective December 3, 1981.

Chapter 43.52 RCW

OPERATING AGENCIES
[Pertinent Provisions]

RCW 43.52.250 *Definitions.* As used in this chapter and unless the context indicates otherwise, words and phrases shall mean: . . .

"Operating agency" or "joint operating agency" means a municipal corporation created pursuant to RCW 43.52.360, as now or hereafter amended. . . .

RCW 43.52.260 *Scope of authority.* The authority granted in this chapter shall apply equally to the generating of electricity by water power, by steam power, by nuclear power or by any other means whatsoever. . . .

RCW 43.52.272 *Power commission abolished.* The Washington state power commission is hereby abolished. . . .

RCW 43.52.300 *Powers and duties of an operating agency.* An operating agency formed under RCW 54.52.360 shall have authority:

(1) To generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any or all such purposes.

(2) To construct, condemn, purchase, lease, acquire, add to, extend, maintain, improve, operate, develop and regulate plants, works and facilities for the generation and/or transmission of electric energy . . . .

RCW 43.52.3411 *Revenue bonds or warrants.* For the purposes provided for in this chapter, an operating agency shall have power to issue revenue bonds or warrants payable from the revenues of the utility properties operated by it. Whenever the board of a joint operating agency shall deem it advisable to issue bonds or warrants to construct or acquire any public utility or any works,

plants or facilities or any additions or betterments thereto or extensions thereof it shall provide therefor by resolution, which shall specify and adopt the system or plan proposed and declare the estimated cost thereof as near as may be. Such cost may include funds for working capital, for payment of expenses incurred in the acquisition or construction of the utility and for the repayment of advances made to the operating agency by any public utility district or city. Except as otherwise provided in RCW 43.52.343, all the provisions of law as now or hereafter in effect relating to revenue bonds or warrants of public utility districts shall apply to revenue bonds or warrants issued by the joint operating agency including, without limitation, provisions relating to: The creation of special funds and the pledging of revenues thereto; the time and place of payment of such bonds or warrants and the interest rate or rates thereon; the covenants that may be contained therein and the effect thereof; the execution, issuance, sale, funding, or refunding, redemption and registration of such bonds or warrants; and the status thereof as negotiable instruments, as legal securities for deposits of public moneys and as legal investments for trustees and other fiduciaries and for savings and loan associations, banks and insurance companies doing business in this state state. . . .

RCW 43.52.360 *Operating agency—Formation—Additional projects—Appeals—Membership, withdrawal—Dissolution.* Any two or more cities or public utility districts or combinations thereof may form an operating agency (herein sometimes called a joint operating agency) for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities and extensions thereof, for the generation and/or transmission of electric energy and power. Each such agency shall be a municipal corporation of the state of Washington with the right to sue and be sued in its own name. . . .